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In The

Supreme Court of the United States

October Term, 1993

PRISCILLA M. GARCIA, MARICELA BUITRAGO, and LOCAL 115, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,

Petitioners,

vs.

SPUN STEAK COMPANY, A CALIFORNIA CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Amici curiae The Women's Legal Defense Fund and Equal Rights Advocates respectfully submit this brief in support of the petition for a writ of *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

I. STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Women's Legal Defense Fund ("WLDF") is a national advocacy organization that was founded in 1971 to advance the rights of women in the areas of work and family. WLDF works to challenge gender discrimination in the workplace through litigation of significant sex discrimination cases, public education, and advocacy for improvements in equal employment opportunity laws and their interpretation before Congress and the federal agencies charged with their enforcement. Throughout this work, WLDF has placed special emphasis on equal employment opportunity for women who belong to racial and/or ethnic minorities, who often face job discrimination based on race and/or national origin as well as gender.

Equal Rights Advocates, Inc. ("ERA") is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to secure equality for women. ERA has a twenty year history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA has been particularly concerned with equality in the work force because economic independence is fundamental to women's ability to gain equality in other aspects of society. As Title VII is one of the foremost federal laws

designated to promote equality in the workplace and protect women from the devastation of discrimination, ERA has a particularly strong interest in the interpretation of Title VII both administratively through the Equal Employment Opportunity Commission and judicially through the courts.

II. SUMMARY OF ARGUMENT

Amici contend that *certiorari* is warranted in this case to settle an intercircuit conflict which threatens to undermine consistent administration of Title VII. This conflict arises from this Court's failure to settle the weight courts must accord the Equal Employment Opportunity Commission's ("EEOC") administrative interpretations of Title VII. The error in this case arises from this confusion. Indeed, the Ninth Circuit panel's opinion compounds the confusion by casting aside the EEOC's administrative interpretation of national origin discrimination under the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e *et seq.*, see 29 C.F.R. § 1606.7, without applying any standard of deference to the EEOC that this Court has ever recognized, and instead substituting its own policy preference.

III. ARGUMENT

THE COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE INTERCIRCUIT CONFLICT OVER THE STANDARD OF JUDICIAL DEFERENCE DUE EEOC INTERPRETATIONS OF TITLE VII.

This Court has at least three extant analyses of the appropriate standard of "deference" to be accorded

administrative interpretations of federal law – the "persuasive force", "great deference" and "controlling weight" standards – all of which are currently applied to EEOC interpretations of Title VII by the various courts of appeals, with predictably scattered results. The Court has contributed to the confusion in the lower federal courts by failing to harmonize the relationship between these three analyses. The analyses of the courts of appeals do not promise to clarify a coherent application of law. Indeed, in deciding this very case, the Ninth Circuit panel did not even bother to apply any of the standards for reviewing EEOC administrative determinations set forth by this Court; it simply disagreed with the EEOC Guideline.

Congress created the EEOC and delegated to it the authority to enforce Title VII. *See* 42 U.S.C. § 2000e-5. Where Congress has delegated enforcement authority to an administrative agency, this Court has held that – at the very least – courts should defer to the agency's interpretations of its governing statute unless there is a compelling reason to differ. In this case, the court below stood this Court's admonition on its head: finding the statute silent, the panel overruled the agency and substituted its own policy preference, rather than deferring to the thoroughly considered, consistent and valid reasoning embodied in the EEOC Guideline.

The Ninth Circuit invalidated the EEOC Guideline on speak-English-only rules not because it found any indication that the EEOC's interpretation of national origin discrimination was contrary to congressional intent, but because it found no mention of speak-English-only rules in the statutory language or legislative history

of Title VII. This analysis is at odds with the principle (central to all of this Court's decisions on the deference to be accorded administrative interpretations) that courts should defer to the interpretations of enforcing agencies, which have greater experience and information than is generally available to the court.

A. The Court Should Clarify a Unifying Principle for the Deference Due The EEOC's Administrative Interpretations of Title VII.

The Court has not yet harmonized its three standards of judicial deference to agency interpretations. For decades, the Court applied contemporaneously two different standards to administrative interpretations of law. Under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), courts did not defer to administrative interpretations of federal statutes, which had only the "power to persuade":

> The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. By contrast, under the "great deference" standard, the balance shifted in favor of administrative interpretation of law. Courts were to defer to an administrative interpretation unless a compelling reason not to defer was found:

> the practical interpretation of an ambiguous or uncertain statute by the executive department

> charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons.

Logan v. Davis, 233 U.S. 613, 627 (1914); *see Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933); *Udall v. Tallman*, 380 U.S. 1, 16 (1964). Where the "power to persuade" standard required only that courts take administrative interpretations into account, the "great deference" standard shifted the presumption in favor of the administrative interpretation, requiring the court to find a compelling reason not to sustain it.

In its first case addressing the standard of deference applicable to the EEOC, the Court decided in *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971), that EEOC interpretations of Title VII are entitled to "great deference." The Court held that the EEOC Guideline's requirement that all job testing be job-related was valid as consistent with the legislative history and language of the statute. *Id.* at 434-36. The Court's analysis began with the EEOC Guideline and buttressed the validity of that Guideline as a correct expression of congressional intent with the language and history of Title VII's enactment. *Id.*

In subsequent cases, however, the Court applied both the *Skidmore* and the *Griggs* analyses to EEOC interpretations of Title VII, without explanation. *See, e.g., Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 94 (1973) (applying *Griggs* standard to EEOC interpretation and holding that courts need not defer to an administrative interpretation where there are "compelling" indications that it is wrong); *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (applying both *Griggs* and *Skidmore* to

EEOC Guideline, but holding under *Skidmore* that administrative interpretive rulings may be accorded less weight than administrative regulations); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 430-435 (1975) (giving controlling deference to the EEOC Guideline on job-testing validation studies under *Griggs* analysis); *EEOC v. Associated Dry Goods*, 449 U.S. 590, 599-600 & n. 17 (1981) (interpreting Title VII with only parenthetical reference to long-standing EEOC interpretation and without reference to either the *Skidmore* or *Griggs* lines of authority).

In 1984, in the context of reviewing an order of the Environmental Protection Agency, the Court set forth a new, two-tier standard of "deference" to administrative interpretations of law. In *Chevron United States, Inc. v. Natural Resources Defense Council, Inc.*, the Court held that if the intent of Congress is clear, the court does not defer to any administrative interpretation of the statute, but simply gives effect to the unambiguously expressed intent of Congress, 467 U.S. 837, 842-43 & n.9 (1984). If, however, the intent of Congress is unexpressed or ambiguous, any reasonable interpretation of the agency that administers the statute is controlling (unless wholly arbitrary); the court may not substitute its policy judgment for that of the agency. *Id.* at 842-46 & n.11.

This approach was based on the Court's recognition, familiar from *Skidmore* and *Griggs*, that where congressional intent is not clear, courts should defer to an administrative agency's superior knowledge and experience within its area of expertise. *Id.* at 844. It was also based on the newly articulated recognition that politically accountable executive agencies, rather than the

courts, should make the policy choices Congress has failed or chosen not to make.

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Id. at 865-66.

There remained a question whether the *Chevron* analysis applied to agencies, such as the EEOC, which have enforcement authority but do not have congressionally delegated rulemaking authority. The Court has not answered this question.[1] In *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115-16 (1988),

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[1] The Court has clarified that the interpretations of an agency without any express authority to administer a statute do not qualify for consideration under *Chevron*. *See Adams Fruit Co., Inc. v. Barrett*, 110 S. Ct. 1384, 1390-91 (1990) (and cases cited therein). This analysis does not govern interpretations of Title VII by the EEOC, however, which has congressionally delegated enforcement authority.

the Court used the language of the *Chevron* analysis, holding that "the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." But the majority failed to mention *Chevron* or, for that matter, *Skidmore*. Instead, it cited to *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), a case in the *Griggs* line. *Id.* In *EEOC v. Arabian American Oil Co., (Aramco)*, 499 U.S. 244, 256-258 (1991), the Court applied the *Skidmore* "power to persuade" standard without reference to *Griggs* or to *Commercial Office Products*, and without any explanation as to why *Chevron* did not apply. *See also id.* at 259-60 (concurring opinion of Scalia, J.). The Court should grant the petition to clarify a principle that harmonizes its several current standards of review of agency interpretations, and to instruct the lower federal courts which standard is appropriate to the EEOC's interpretations of Title VII.

B. The Court Should Resolve the Split in the Circuits Over the Appropriate Weight to Be Accorded EEOC Guidelines and Other Interpretive Rules.

In light of the review set forth above, it is unsurprising that, since 1991, those circuit courts of appeals that have addressed the issue of the weight to be accorded EEOC Guidelines and other interpretive statements have disagreed about the applicable Supreme Court standard. The Fifth, Sixth (sometimes) and Seventh Circuits have applied *Chevron's* "controlling weight" standard;[2] the Third (sometimes), Sixth (sometimes) and

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[2] *See Rowe v. Sullivan*, 967 F.2d 186, 194 (5th Cir. 1992) (EEOC determination of retroactivity controlling); *Jackson v.*

Ninth Circuits have applied the *Skidmore* "persuasive force" standard, as last articulated in *Aramco*;[3] and the Third (sometimes) and Tenth Circuits have continued to apply the *Griggs* "great deference" standard, as last articulated in *Commercial Office Products*.[4] This analysis does not address the confusion in the district courts in those circuits which have not yet confronted these

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Richards Medical Co., 961 F.2d 575, 581 (6th Cir. 1992) (procedural regulation must be sustained if reasonable); *Vogel v. Cincinnati*, 959 F.2d 594, 598 (6th Cir.) (EEOC determination of retroactivity controlling), *cert. denied*, 113 S. Ct. 86 (1992); *Philbin v. General Electric Capital Auto Lease, Inc.*, 929 F.2d 321, 324 (7th Cir. 1991) (EEOC regulation allowing relation back controlling); *Marlowe v. Bottarelli*, 938 F.2d 807, 811-12 (7th Cir. 1991) (applying *Chevron* analysis but holding that EEOC interpretation not controlling because statute unambiguous on its face).

[3] *See Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1421 n.11 (3d Cir.) (court need not defer to EEOC view), *cert. denied*, 112 S. Ct. 379 (1991); *Jackson*, 961 F.2d at 581 (substantive regulation may be entitled to deference); *Estate of Reynolds v. Martin*, 985 F.2d 470, 476 & n.5 (9th Cir. 1993) (EEOC interpretations of retroactivity not entitled to deference); *Davis v. San Francisco*, 976 F.2d 1536, 1555 (9th Cir. 1992) (EEOC interpretation of retroactivity not entitled to deference).

[4] *See Miller v. Beneficial Management Corporation*, 977 F.2d 834, 843 (3d Cir. 1992) (deferring to EEOC interpretation of Equal Pay Act claims as continuing violations); *Crozier v. Howard*, 11 F.3d 967, 970-71 & n.4 (10th Cir. 1993) (deferring to EEOC interpretation of ADEA).

issues.[5] The Court should grant certiorari to resolve these differences.

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[5] In the Second Circuit, *compare Bridges v. Eastman Kodak Co.*, 800 F. Supp. 1172, 1175-76 (S.D.N.Y. 1992) (applying "persuasive force" standard and rejecting EEOC policy statement) *with Reynolds v. Frank*, 786 F. Supp. 168, 169 (D. Conn. 1992) (applying *Chevron* "controlling weight" standard and deferring to same EEOC policy statement) *and Boss v. Board of Education*, 798 F. Supp. 116, 120 (E.D.N.Y. 1992) (same). In the Third Circuit, *compare Aiken v. Bucks Ass'n for Retarded Citizens*, 799 F. Supp. 522, 533-34 (E.D. Pa. 1992) (applying "persuasive force" standard and rejecting EEOC policy statement) *and Tyree v. Riley*, 783 F. Supp. 877, 888-89 (D.N.J. 1992) (applying "controlling weight" standard and deferring to same EEOC policy statement). In the Eleventh Circuit, *compare Haynes v. Shoney's, Inc.*, 803 F. Supp. 393, 400 n.19 (N.D. Fla. 1992) (applying "persuasive force" standard and rejecting EEOC policy statement) *and King v. Tandy Corporation*, 798 F. Supp. 701, 705 (M.D. Ga. 1992) (applying "controlling weight" standard and deferring to same EEOC policy statement).

III. CONCLUSION

For the reasons stated above, *amici curiae* respectfully request that this Court grant the Petition for Writ of Certiorari prayed for by Petitioners.

Respectfully submitted,

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